12-14-2012

State v. Knott Appellant's Brief Dckt. 40074

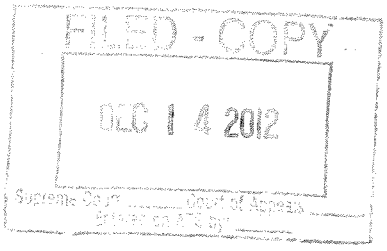
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. DAVID M. KNOTT, Defendant/Appellant.	)	No. 40074-2012

APPELLANT'S OPENING BRIEF

Appeal from the District Court
of the Fifth Judicial District of the State of Idaho
In and For the County of Blaine

Honorable Robert J. Elgee
Presiding Judge



Andrew Parnes, #4110
Law Office of Andrew Parnes
671 First Avenue North
Post Office Box 5988
Ketchum, Idaho 83340
208-726-1010

Attorney for Defendant/Appellant

Lawrence Wasden
Attorney General
P.O. Box 83720
Boise, Idaho 83720
208-334-2400

Attorney for Plaintiff/Respondent

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STATEMENT OF THE CASE

Appellant David Knott was charged by citation with Driving under the Influence on August 14, 2010, in violation of I.C. § 18-8004, after refusing to take a breath test in violation of I.C. §18-8002. Mr. Knott successfully challenged the refusal which was dismissed on the basis that the advisory form was ambiguous as to Mr. Knott, who was an out-of-state licensed driver. See Clerk's Record on Appeal, hereafter "R," p. 24 [October 20, 2010 Order in CV-2010-654[1].]

On April 15, 2011, Mr. Knott filed a motion in the criminal case to exclude evidence of the refusal in the State's case-in-chief on the grounds that 1) a proper advisement is a necessary foundational element for introduction of the refusal; 2) without a proper advisement, the evidence of the refusal denies Mr. Knott's rights under the Fifth Amendment; 3) the introduction denies Mr. Knott his fundamental right to due process of law under the federal and state constitutions; and 4) I.R.E. 403 prohibited use of the refusal as it is more prejudicial than probative given the improper advisement. R p. 35. After argument on the motion, the Magistrate Court denied the motion in a written opinion filed on April 29, 2011. R p. 49.

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[1]The Magistrate Court relied on the District Court decision in *State v. Kling*, Blaine County case No. CV-2007-1034, which was later affirmed by the Court of Appeals in *State v. Kling (In re Kling)*, 150 Idaho 188, 245 P.3d 499 (Ct. App. 2010).

Mr. Knott filed a motion for reconsideration [R p. 58] which was denied on May 5, 2011 [R p. 70], after further argument and receipt of additional evidence.

On June 21, 2011, Mr. Knott entered a conditional plea of guilty to the driving under the influence charge, preserving the right to appeal the denial of his motion to exclude evidence of the refusal [R p. 76], and thereafter appealed to the District Court. R p. 80. The District Court affirmed the Magistrate decision on May 17, 2012. R p. 142.

Mr. Knott thereafter filed a timely Notice of Appeal to this Court on June 15, 2012. R p. 144.

STATEMENT OF FACTS

Mr. Knott, a resident of New York state, was driving his vehicle in the Sun Valley area on August 14, 2010. Police stopped and eventually arrested Mr. Knot for driving under the influence. The circumstances of the arrest are not at issue in this appeal.

The arresting officer took Mr. Knott to the Sun Valley Police Department where he played an audio-taped advisory regarding alcohol testing for Mr. Knott and gave him a copy of the form to review. After the playing of the tape, the officer told Mr. Knott, "you can either take the test or you can refuse. It is completely up to you." R p. 148, 5/4/11 Exhibits A-B. Mr. Knott stated that he was "not sure of the consequences" of refusing the test. The officer told Mr. Knott there would be a $250 fine and the loss of his "Idaho Driver's license." Ibid. Later, still not understanding, Mr. Knott again asked about what would happen if he refused the breath test, saying he did not have an Idaho driver's

license. Ibid. Mr. Knott subsequently politely refused the breath test, and was cited for Driving Under the Influence. The officer then drove Mr. Knott back to where he was staying in Sun Valley.

ISSUE PRESENTED ON APPEAL

Whether the State in its case-in-chief can present evidence that an out-of-state licensed driver refused the evidentiary test despite a court ruling that the officer improperly advised him of the consequences of a refusal.

LAW AND ARGUMENT

1. Standard of Review

When an appellate court is reviewing a district court decision, acting in its appellate capacity, this Court reviews the record and the magistrate's decision independently of, but with due regard for, the district court's decision. *Doe v. State*, 137 Idaho 758, 760, 53 P.3d 341, 343 (2002) (quoting *Walborn v. Walborn*, 120 Idaho 494, 498, 817 P.2d 160, 164 (1991)).

A court of appeal exercises free review over questions of law. See, e.g. *Fields v. State*, 149 Idaho 399, 400, 234 P.3d 723, 724-25 (2010); *Allied Bail Bonds v. County of Kootenai*, 151 Idaho 405, 409, 259 P.3d 340, 344 (2011). Questions regarding the admissibility of evidence are reviewed using a mixed standard. First, whether the evidence is relevant is a matter of law that is subject to free review. *State v. Stevens*, 146 Idaho 139, 143,191 P.3d 217, 221 (2008), citing *State v. Field*, 144 Idaho 559, 569, 165

P.3d 273, 283 (2007). However, the lower court's determination of whether the probative value of the evidence outweighs its prejudicial effect is reviewed for an abuse of discretion. *Stevens*, 146 Idaho at 143.

Whether the magistrate court abused its discretion is determined by examining the following: (1) did the court correctly perceive the issue as one of discretion; (2) did the court act within the outer boundaries of its discretion and consistently within the applicable legal standards; and (3) did the court reach its decision by an exercise of reason? *State v. Shackelford*, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010).

2. The Evidence of the Refusal Should Have Been Excluded

Mr. Knott submits that a defendant must be properly notified of the consequences relating to refusing evidentiary testing before that refusal may be used against a defendant in the underlying criminal DUI case. While the Idaho Supreme Court has held generally that a refusal to take an alcohol test may be admissible at a criminal trial, the Idaho appellate courts have not set forth clear rules on the foundational requirements for the admission of such evidence. See, *State v. Brock*, 80 Idaho 296, 328 P.2d 1065 (1958).[2]

A. Relevance and Foundational Requirements

Mr. Knott argued below that holding and reasoning in *State v. Salts,* Blaine County Case CR-2003-15090, was applicable in this case, and that the foundational requirements

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[2]*Brock* was decided under a statutory scheme where a driver had a clear right to refuse the test and the police were prohibited from taking a test after a refusal. See, I.C. § 49-352 in effect in 1955, subsequently repealed and replaced by I.C. § 18-8002.

for the admission of refusal evidence include proper advisement of the consequences set forth by the statute. In *Salts* the court first held that "the improper notification by Marshall Tremble of the rights possessed by Ms. Salts pursuant to § 18-8002 bars the admissibility of her refusal to submit to evidentiary testing and that any subjective interpretation of Ms. Salts' thoughts would not be productive." R p. 44 [Exhibit A to Knott's Memorandum in Support of Motion in Limine.] In essence, holding that the evidence was now not relevant, or "productive." The opinion also excluded the evidence on the basis that the State's burden of admitting refusal evidence in criminal cases should be "at least as high" as in the civil proceedings. R p. 45. Finally, the opinion held that the evidence was more prejudicial than probative precisely because of the mis-information provided by the arresting officer. R p. 46.

Both the magistrate and district court rejected the *Salts* reasoning, adopting the view that a defendant's refusal is admissible regardless of the sufficiency of the advisory. The magistrate rejected the idea that any foundational requirements are necessary for the admission of the refusal evidence, holding that the consequences of the refusal "have nothing to do with the criminal consequences of the same refusal." R p. 70. See also April 25, 2011 Reporter's Transcript on Appeal from Magistrate Court, hereafter "Tr. I," pp. 18-19. The district court stated that it was "reversing" its earlier decision in *Salts*, concluding the sufficiency of the advisory and its impact on the defendant's refusal was a

question for the jury. May 9, 2012 Reporter's Transcript on Appeal from District Court, hereafter "Tr. I," p. 40-45.

The opinion in *State v. Salts,* however, retains its validity and should be followed by this Court.[3] The relevance and probative value of a defendant's refusal to submit to an evidentiary test is tied to the issue of guilt solely because it creates an inference that the defendant is trying to hide evidence. However, this "consciousness of guilt" inference cannot be sustained where the improper advice "eliminate[d]" the defendant's knowingly, willful and voluntary refusal to take a breath test. R p. 45. In other words, the refusal evidence loses its probative value when it is the product of the improper advice . While not controlling precedent, the *Salts* reasoning should be followed by this Court; refusal evidence should be barred where an improper advisory undermines the relevance of that evidence to the extent that its probative value is substantially outweighed by its potential for unfair prejudice.

Cases from other jurisdictions, and cited in the trial court by Mr. Knott, support this conclusion.

In *Longley v. State of Alaska*, 776 P.2d 339, 344 (Alaska App. 1989), the court stated:

> Longley's initial refusal to submit to the intoximeter test is not admissible under the terms of AS 28.35.032 because Longley had not yet

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[3]The decision in *Salts* was affirmed on appeal by the District Court.

> been advised that his refusal could be used as evidence against him, as required by subsection(a) of the statute. A showing that the warnings required by the implied consent statute were given is necessary to establish a foundation for the admission of evidence of a refusal. . . .

The court held that the warning requirement was intended to assure an informed choice on the part of the motorist, and that it would be unfair to attach to the refusal a consequence of which the driver had not been notified. *Ibid.*

In contrast, in *State v. Forney*, 659 P.2d 929 (Oregon App. 1985), when proper warnings were provided, the refusal was admissible.

> Without some evidence that the defendant was not given the appropriate statutory warnings or did not understand what his refusal would mean - - and there is no suggestion of either sort of infirmity in this case - - defendant did refuse to take the test, and the State was entitled to use evidence of it.

Similarly, in *Moore v. State* 458 S.E.2d 479, 480 (Georgia App. 1995), the court stated:

> A defendant's refusal to permit a chemical analysis to be made of his blood, urine, or other bodily substances at the time of his arrest is admissible in evidence against him in a criminal trial. However, a defendant must knowingly, willfully and voluntarily refuse to submit to a State-administered test before such refusal is admissible. A criminal defendant is not required to submit to a State-administered test if he has not been properly informed of his implied consent rights. Under such circumstances, the refusal is justified, and any evidence of the refusal is inadmissible.

In *State v. Miceli*, 554 N.W.2d 427, 431 (Nebraska App. 1996), where evidence of the defendant's refusal to submit to a chemical breath test went to the jury, despite the

fact that the defendant was not properly informed of all the consequences of refusing or of taking and failing a chemical breath test, the Court of Appeal noted that the

> Supreme Court held that a license revocation based upon an attempted advisement by a form identical to the form used in this case constituted plain error. . . . . This court recently held under *Smith* and its progeny that such evidence should not have gone before the jury and that the fact it did reach the jury was prejudicial and constituted plain error which required a reversal of a DUI conviction and remand for a new trial.

And in *Janak v. State of Texas*, 826 S.W.2d 803, 805 (Texas App. 1992), the court stated:

> Janak also asserts that the trial court erred in allowing Officer Farmer to testify, over objection, that Janak refused to take a blood test. Janak contends that evidence of a statutory warning, as required by Tex.Rev.Civ.Stat.Ann. Art. 6701l-5 is a predicate for admission of this evidence, and since no evidence of the warning was offered, the refusal evidence should not have been admitted. We agree. As the refusal to take a blood test is in the nature of an incriminating act or statement, evidence of it is not admissible unless the statutory warning was given. Evidence that the warning was given is a necessary predicate to the refusal's admissibility.
>
> There was no scientific evidence of Janak's intoxication. The only evidence of it was from Officer Farmer, who testified about his conclusions based on Janak's condition and actions. Evidence that Janak refused to take a blood test was thus, in those circumstances, harmful.

The magistrate court sought to distinguish these cases. The court disregarded *Longley v. State*, 776 P.2d 339 (Alaska App. 1989) by asserting that it relied entirely on the application of a specific statute for its ruling, but this was incorrect. While it is true that the *Longley* court held that the statute had not been complied with because the refusal was discussed before the defendant had been arrested, the court went on to hold that the refusal could not be admitted under prior case law because the mis-advice adversely affected the person's informed choice.

> Without the warnings, a refusal to submit to an Intoximeter test may not come in under AS 28.35.032(e). A case such as this one is controlled by the cases decided prior to the 1980 amendment to AS 28.35.032, which added subsection (e) and the requirement of a warning that a refusal may be used against the person. In *Puller v. Anchorage*, 574 P.2d 1285 (Alaska 1978), the supreme court held that a refusal to take a breathalyzer test was inadmissible because the warnings given under AS 28.35.032 at that time did not include a warning that a refusal could be used as evidence against the driver. *The court held that the warning requirement was intended to assure an informed choice on the part of the motorist, and that it would be unfair to attach to the refusal a consequence of which the driver had not been notified. Puller*, 574 P.2d at 1288. See also *Wirz v. State*, 577 P.2d 227 (Alaska 1978) (if an arrestee refuses to take the test, he must be advised of the consequences flowing from his refusal, and be permitted to reconsider his refusal in light of that information). *Longley's refusal to take the test was not an informed choice. He had not yet been warned of any of the possible consequences of refusing, and as soon as he received those warnings, he agreed to submit to the test. Under these circumstances his refusal should not have been admitted.*

Id. at p. 345 [emphasis added].

The magistrate court discounted *Forney* as dicta. R p. 55. While the language from that case may be dicta, it stands for the proposition that appropriate warnings should be given in order to admit the refusal evidence. Thus, while there was no such evidence presented in *Forney*, the failure to provide adequate warnings has been conceded here.

The magistrate court rejected *Moore v. State*, 458 S.E.2d 479 (Georgia App. 1993) solely because of a "right to refuse" in Georgia which is not "relevant" in Idaho. R p. 55. Yet, the critical holding in *Moore* and the cases it relies upon is the premise that the defendant must make an informed choice under the implied consent laws. Thus in "[a]pplying an objective standard, we conclude that, in view of the state of the evidence

and the findings of fact by the trial court supported thereby, appellee was deprived by the totality of the inaccurate, misleading, and/or inapplicable information given to him by the arresting officer of making an informed choice under the implied consent statute, and accordingly, the trial court did not err in concluding that appellee's refusal to consent to the urine test was rendered inadmissible." *State v. Leviner*, 443 S.E.2d 688, 691 (Georgia App. 1994).

Next, the magistrate court found that *State v. Miceli*, 554 N.W.2d 417 (Nebraska App. 1996) turned on the specifics of the advisement which had been changed by statute, thereby making the case irrelevant here. However, the premise of that case remains – when a person has been misinformed of the consequences of the refusal, that refusal cannot be admitted at trial. Finally, the statutory language referred to in *Janak v. State*, 826 S.W.2d 803 (Texas App. 1992) was not repealed, as the magistrate concludes, but merely was replaced by another similar statute in 1995. See, Tex. Trans. Code § 724.015.[4]

Thus, these out-of-state cases should be considered as persuasive precedent on the issue before this Court. They all stand for the proposition that refusal evidence tainted by improper advice from the police loses its relevance at a criminal trial on the issue of the

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[4]In fact, many of these states have statutes which state that evidence of the refusal is admissible in a criminal trial. See, e.g. Tex. Trans. Code § 724.061, Alaska Stat. § 28.35.032(e). In contrast, the Idaho Legislature has not enacted such a law, leaving it to the judiciary to establish the conditions under which a refusal should be admitted in a criminal trial.

driver's consciousness of guilt, the sole basis for admission of the evidence. Therefore, Mr. Knott's motion in limine should have been granted, and the magistrate court decision should be reversed on these grounds.

The magistrate court further erred in its Rule 403 analysis. In reviewing a decision under Rules of Evidence, Rule 403, this Court must apply an abuse-of-discretion standard of review. Here, there is no indication in the ruling that it viewed this issue as one where discretion was to be applied. The court extensively addressed the issue that there was no right to refuse, and therefore evidence of the refusal was required to be admitted in all circumstances in Idaho law. In contrast, the court considered the weighing issue in two short sentences: "The fact that the Defendant refused a test is probative of his consciousness of guilt. Improper warnings about the consequences of refusal *in a separate civil proceeding* do not make that evidence so prejudicial that admission of it is prohibited." R p. 56 (emphasis added).

Thus, by applying an incorrect legal standard the trial court abused its discretion, and its ruling should have been reversed by the district court. The magistrate court did not engage in a full analysis of the factors under Rule 403, which states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In this case, the admission of the refusal evidence would result not only in prejudice to Mr. Knott, but confusion of the issues, misleading of the jury and waste of time. While the magistrate court did not address the issue of how the jury would be informed of or instructed on the erroneous information provided to Mr. Knott, given the importance of the refusal evidence to the State's case, much of the trial would consist of evidence on the issue of why Mr. Knott refused the test and not whether he was under the influence when he drove the car. Because much of the trial would hinge on the "subjective interpretation" of Mr. Knott's thoughts when he refused the test after the improper advice from the officer, the evidence should have been excluded under a complete and proper Rule 403 analysis.[5]

B. The Cases Relied upon by the Lower Courts Are Not Controlling

It is uncontested that Mr. Knott was improperly advised about the consequences of his refusal. However, in affirming the magistrate decision allowing the State to introduce evidence of Mr. Knott's refusal of the breath test, the District Court relied on *State v. Decker*, 152 Idaho 142, 267 P.3d 729 (Ct. App. 2011), and the cases cited therein,[6] to

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[5]Mr. Knott sought exclusion of this evidence only in the State's case-in-chief, but conceded throughout that the State might be able to introduce this evidence as rebuttal or in cross-examination should the door be opened in the defendant's case. The exclusion of this evidence during the State's case is the proper remedy for the failure to provide proper advice to Mr. Knott before his refusal.

[6]See, *State v. Woolery*, 116 Idaho 368, 373, 775 P.2d 1210, 1215 (1989); *State v. DeWitt*, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008); *State v. Harmon*, 131 Idaho 80, 85, 952 P.2d 402, 407 (Ct. App. 1998)

hold that the "refusal of evidentiary tests are (sic) admissible at trial even if the officer failed to notify the defendant or notify the defendant properly of the consequences of the refusal." Tr II p. 40. The Court noted that there was no right to refuse a breath test in Idaho[7] and stated,

> [A]dmissibility, . . .shifts to a relevance analysis, and [a] failure to comport with 18-8002A does not implicate the procedure in the criminal case because 18-8002A and 18-8002 are devoted entirely to the administrative or civil suspension of the license of the driver. . . .
>
> The defendant would appear to be free to argue that the reason he refused is because he thought his out-of-state license would not be taken based on the improper representations of the officer. And I think at the trial court level the defendant can ask for instructions to the jury on the state of the law, . . .

Tr II p. 42-44.

The cases relied upon by the magistrate and district court do not address the issue raised in this appeal and are not controlling. First, all involve situations where the State sought to introduce evidence of breath test results, not the evidence of the refusal. *State v. Decker*, 152 Idaho 142, *supra* [blood test results] (2011), *State v. Woolery*, 116 Idaho 368, *supra*, [blood]; *State v. Harmon*, 131 Idaho 80, *supra*, [breath]; and *State v. DeWitt*, 145 Idaho 709, *supra*, [blood]. Thus, these cases would be controlling only if the officer

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[7]The magistrate court similarly held that because Mr. Knott had no "right to refuse," evidence of his refusal was admissible despite the improper and misleading advice provided to him by the arresting officer. See R p. 49.

had administered a blood test after Mr. Knott had chosen to refuse the breath test. But, that is not the factual situation here.

Second, these cases all involve the "implied consent" statute which permits the police to obtain evidence of a person's blood alcohol level even if no warnings are provided or even if the person is unconscious. These statutes are rooted in the notion that driving is a privilege and that a person has given implicit consent to the search by using a motor vehicle on the roads of the state. Because the implied consent statute has no direct bearing on the question presented in this case – the relevance and prejudicial effect, and therefore the admissibility of a refusal, where the officer gave improper advice about the consequences of the refusal – the holdings of these cases do not control here.

Third, the officer in this case told Mr. Knott that he had a *choice*, and in fact the officer honored that choice by not obtaining an alcohol test from Mr. Knott. Thus, regardless of whether he had a "legal" right to refuse, the officer's specific statement that Mr. Knott had that choice – without explaining all of the consequences of that choice – controls in this situation. Because an innocent driver would reasonably elect not to take the test under these circumstances, the inference of guilt which makes the refusal evidence relevant to the issues to be decided by the jury, the State should not be able to introduce this evidence in light of the officer's misinformation.

Indeed, the court of appeals has noted: "Also, the out-of-state driver may well not understand what impact, if any, the limitation that the license is valid in Idaho for only

thirty days has on its validity outside of Idaho, including in the issuing state. Under these circumstances, an out-of-state driver who does not plan to remain in this State may be substantially more likely than the in-state counterpart to refuse evidentiary testing." *State v. Kling*, 150 Idaho at 193.[8] Because the improper advice in this case the likelihood of the driver refusing the test, the State should not be permitted to now use this wrongfully induced refusal against Mr. Knott.

None of the cases relied upon by the magistrate court confront the issues raised by the court in *Salts*. As set forth above, the cases relied upon by the magistrate were cases where the alcohol tests had been taken and did not address the admission of the refusal evidence itself.

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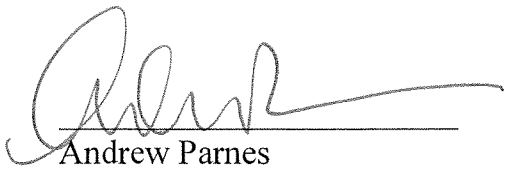
[8]Indeed, the prosecutor conceded the significance of the improper advisement: "And I think some out-of-state people would be led to believe that nothing is going to happen to them if they refused. I think that's the worst thing that you could say about the ambiguity of the form, not that worse things would happen to them than would be possible, but then maybe nothing would happen to them, and that's why they refuse." April 25, 2011 Reporter's Transcript on Appeal from Magistrate Court, hereafter "Tr. I" pp. 8-9.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the decision of lower court, set aside Mr. Knott's conviction, and order that the evidence of the refusal be excluded from the State's case-in-chief.

DATED: December 13, 2012,



Andrew Parnes
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

I, Emily Dion, declare:

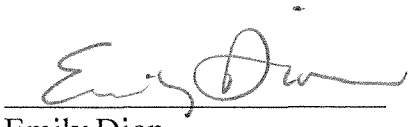
I am employed in the County of Blaine, State of Idaho. I am over the age of eighteen years and not a party to this action. My business address is 671 First Avenue North, Ketchum, ID 83340.

On December 13, 2012, I served the within:

APPELLANT'S OPENING BRIEF

by placing two true copies thereof in sealed envelopes with postage thereon fully prepaid, in the United States mail at Ketchum, Idaho, addressed as follows:

Lawrence Wasden
Attorney General, State of Idaho
P.O. Box 83720
Boise, ID 83720-0010



Emily Dion